88-1133

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NIELS H. OSTER, M. D.
Petitioner

vs

OTIS R. BOWEN, M. D., SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

RICHARD P. KUSSEROW, INSPECTOR GENERAL UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND

MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Niels H. Oster, M. D., Counsel Pro Se
P. O. Box 835, Essex Square
Tappahannock, Virginia 22560
(804) 443-5311

179pp

QUESTIONS PRESENTED

1. Is an award of Attorney's fees appropriate under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Section 2412(b) and 28 U.S.C. Section 2412(d) (1) (A), and the common law doctrines of common benefit and bad faith when a plaintiff obtains a result in litigation against the Medical Society of Virginia and the Federal Government that benefits him and other citizens by vindicating important constitutional principles.

2. Did Dr. Oster prevail against the United States Government and the Medical Society of Virginia Review Organization because new procedures were initiated as a result of his litigation and as a prevailing party is he entitled to an award of attorney's fees, even though the court did not reach final adjudication?

3. Is the petitioner, Dr. Niels H. Oster, entitled to attorney's fees under the bad faith exception to the American Rule because the Medical Society of Virginia acted in bad faith by using adverse publicity and premature release of information concerning Dr. Oster with reckless disregard of whether it was substantiated fact or not and did the Federal Government support these acts of bad faith by allowing itself to be co-defendant with the Medical Society of Virginia Review Organization?

4. Further, did the Medical Society of Virginia Review Organization act in bad faith by denying Dr. Oster due process and equal protection under the United States Constitution and the Federal Administrative Process Act?

LIST OF PARTIES

The only parties to this action are listed in the caption.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Niels H. Oster, M.D.
Petitioner,

vs

Otis R. Bowen, Secretary
United States Department of Health
and Human Services;

Richard P. Kusserow, Inspector
General, United States Department
of Health and Human Services; and

Medical Society of Virginia
Review Organization,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

Niels H. Oster, M.D. petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit which was entered on September 15, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals dated September 15, 1988 for the Fourth Circuit is reprinted as Appendix A, pages A-1 to A-3, and the Order of the District Court for the Eastern Division of Virginia dated June 7, 1988 as Appendix B, pages B-1 to B-2. The Order of the District Court for the Eastern Division of Virginia dated January 13, 1988 is reprinted as Appendix C, pages C-1 to C-19, Appendix D, pages D-1 to D-2. The opinion of the Court of Appeals has not been published as of this date.

JURISDICTION

The Court of Appeals entered judgment on September 15, 1988 denying petitioner because of untimely filing. Jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Niels H. Oster, M.D., a licensed physician in private practice in Tappahannock, Virginia seeks award of attorneys fees and costs in the amount of $138,996.58 payable solely by the Medical Society of Virginia Review Organization. Medical Society of Virginia Review Organization is a peer review organization

acting under contract with the Secretary of Health and Human Services which in 1986 brought Dr. Oster under investigation relative to his medical practice. Appendix E, pages E-1 to E-50.

In the subsequent hearings that followed Dr. Oster was not afforded due process of law and certain constitutional rights were denied him. Appendix E, pages E-1 to E-50. He therefore found it necessary to file suit against the Medical Society of Virginia Review Organization; Secretary Otis R. Bowen of the United States Department of Health and Human Services; Richard P. Kusserow, Inspector General, United States Department of Health and Human Services, seeking Declaratory and injunctive relief concerning the use of peer review organizations to sanction physicians participating in the Medicare program.

The American Medical Association attempted to intervene in Oster v. Bowen but were denied permission. They then filed virtually an identical lawsuit in the United States District Court for the District of Columbia. Ultimately, new procedures, the same procedures Dr. Oster sought were issued in May 1987. Appendix G, pages G-1 to G-11, and Appendix H, pages H-1 to H-8. Subsequently, Dr. Oster moved for dismissal on grounds that the defendants adopted new procedures providing him with the relief he sought. The Case was dismissed in District Court on October 20, 1987, Appendix D, pages D-1 to D-2. Dr. Oster moved for attorney's fees and costs in the United States District Court for the Eastern District of Virginia, Richmond Division under the Equal Access to Justice Act, 28 U.S.C. Section 2412 seeking to recover attorneys

fees and costs in the amount of $138,996.58. Dr. Oster's motion for an award of fees and costs satisfied the requirement of the Equal Access of Justice Act.[1] Appendix F, pages F-1 to F-2. Dr. Oster contends that any award should not be restricted by the $75/hr rate, because of the limited availability of qualified counsel, specializing in health law and more particularly in Medicare and Social Security law. See Appendix I, pages I-1 to I-5, Appendix J, pages J-1 to J-5, Appendix K, pages K-1 to K-5. The District Court denied Dr. Oster's motion citing Varandani v. Bowen, Civil Action No. 86-2603 decided in the United States

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[1]Dr. Oster satisfies the net worth requirement of 28 U.S.C. Section 2412 (d) (2) (B); he has a net worth of less than $2,000,000.00.

Court of Appeals, Appendix C, pages C-1 to C-19. The Court used the decision against Varandani as one of their basis for denying Dr. Oster's motion; however, Varandani did succeed in later action.[2] Dr. Oster filed for reconsideration and was denied on June 7, 1988. Appendix B, pages B-1 to B-2. Because of substantial attorneys fees which eventually reached approximately $184,000., Appendix L, pages L-1 to L-9, Dr. Oster found it necessary to dismiss his attorneys and appeal this decision counsel pro se. Due to a misconception of filing time his informal

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[2]Varandani did not prevail in the Court of Appeals but soon after petitioned the United States Supreme Court; such petition was later dismissed upon Dr. Varandani's request because he prevailed in the case through the obtaining of an out of court settlement with the Medical Society of Virginia Review Organization.

brief arrived one day late and the United States Court of Appeals for the Fourth District dismissed his case because they had no jurisdiction due to the untimely filing.

REASONS FOR GRANTING THE PETITION

1. Dr. Oster is entitled to an award of fees and costs under the Equal Access To Justice Act Sections 28 U.S.C. and 2412(b).

The court is authorized to award reasonable attorneys fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award". It is well established that an award of attorneys fees is appropriate when the litigation either had conferred a common benefit upon persons in addition to the immediate

plaintiff,[3] or when the defendants have acted in bad faith or for oppressive reasons.[4] The District Court in denying the motion noted that the common benefit exception makes it generally unsuitable as a means to award fees against the United States. While in many cases, the common benefit theory has been applied in situations where there is a monetary recovery, the Supreme Court has held that an award of attorneys fees is not

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[3]In Mills v. Electric Auto-lite 396 U.S. 375, 391-396 (1970) the Supreme Court held that a corporation's stockholders were entitled to an award of attorney's fees and costs, payable by the corporation, under the common benefit theory. The fact that the stockholders' litigation had not created a common fund did not matter. 396 U.S. at 392. The fact that other stockholders benefited was sufficient to justify an award.

[4]See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975). Hyatt v. Heckler, 586 F. Supp. 1154 (W.D.N.C. 1984).

necessarily precluded by the lack of monetary recovery, Mills v. Electric Auto-lite Company, 396 U.S. at 392-393. The fact that the Supreme Court has construed the common benefit theory not to preclude an award of Attorneys fees, when there is no monetary recovery, confirms the conclusion that Congress contemplated the payment of Attorneys fees in that type of situation.

Thus, when a plaintiff obtains a result in litigation against the Federal Government that benefits him and that benefits other citizens by vindicating important constitutional principles, an award of attorneys fees is appropriate. Id. at 393 (a precedential effect justifies an award of fees and costs).

2. Pursuant to 28 U.S.C. Section 2412 (b), Dr. Oster is entitled to an award of attorneys fees in the amount of $138,996.58 based upon the bad faith and/or oppressive reasons of the defendants who are jointly and

severally liable.

In Dr. Oster's case, the federal defendants refused to settle the lawsuit with Dr. Oster on terms that were far more generous to the Federal Government than the terms the Federal Government finally agreed to in order to avoid a lawsuit by the American Medical Association. The fact that the Federal Government would not settle with an individual of limited means and resources but would settle with a national organization with resources to litigate underscores the importance for an award in this case. The courts have consistently held that the purpose of the Act is to penalize unreasonable behavior on the part of the government without impairing the vigor or flexibility of its litigation position". See Pullen v. Bowen, Civ. Action No. 86-1668, slip op. at 4 (4th Cir. June 2, 1987). The

affidavit of Mr. Benjamin Heineman, the trial counsel of the American Medical Association establishes that the federal defendants refused to settle with Dr. Oster because he was "just" Dr. Oster. Appendix M., pages M-1 to M-10. The federal defendants have no excuse or reasonable explanation to offer as to why they would settle with a major national organization and yet, refuse the same settlement with an individual other than that they hoped to discourage, penalize, and outlast Dr. Oster. The MSVRO did act in bad faith by using adverse publicity and premature release of negative information concerning Dr. Oster with reckless disregard as to whether it was true or not. See Appendix N, pages N-1 to N-10. The Federal Government in allowing itself to be co-defendant with the MSVRO supported these acts of bad faith. Judge

Merhige of the District Court at one point at the June 4, 1986 hearing described the hearings as "having the appearance of a kangaroo court" and further stated later that Dr. Oster was being denied due process of law. Appendix O, pages O-1 to O-2, Appendix P, pages P-1 to P-2.

In this case, the defendants refused to provide Dr. Oster with even the most fundamental aspects of procedural due process, forcing him to file his lawsuit. First, the MSVRO, acting as an agent of the Federal Secretary, notified Dr. Oster, that it had already determined him to be a gross and flagrant violator of his medicare obligations. Before they even heard from him they concluded he was guilty. The defendants violated 42 CFR Section 476.105 (b) (2) by notifying his hospital, a third party before he had an opportunity to respond to the charges.

See 42 CFR Section 476.104 (a) (1). That regulation required the MSVRO to notify Dr. Oster thirty days before the PRO disclosed information concerning him to his hospital in order to give him an opportunity to submit additional information. The MSVRO's premature and conclusory notice to the hospital confirms the unreasonable, bad faith or oppressive approach of the defendants. They damaged Dr. Oster without any kind of prior notice or hearing.

Following the June 4, 1986 hearing, the defendants notified the Virginia State Board of Medicine about Dr. Oster's alleged violations. The timing of this notification to the State Board of Medicine is significant for two reasons. First, it occurred before the defendants had heard any defense or response from Dr. Oster to the charges. Secondly, the

defendants had no rational, fair-minded basis for notifying the Board of Medicine at all on June 4, 1986. Their actions, taken after Dr. Oster successfully obtained a temporary restraining order, can be assumed to be a manifestation of their pique. Had there been a legitimate reason for disclosing any information to the Board of Medicine prior to hearing Dr. Oster's defense, the defendants would have done so prior to June 4, 1986. In addition, disclosure to the Board, absent principles, an award of attorney fees is appropriate. Id. at 393 (a precedential effect justifies an award of fees and costs).

3. Pursuant to 28 U.S.C. Section 2412 (d) (1) (A), Dr. Oster is entitled to an award in the amount of $138,996.58 on the basis that (1) he is a prevailing party, that (2) the position of the United States was not substantially justified, that (3) there are no special circumstances making an award unjust, and that (4) the limited availability of qualified counsel

justifies an award of this amount.

Dr. Oster sought, through his lawsuit, to obtain minimal due process protections at the September 10, 1986 hearing before the MSVRO's Quality Assurance Committee. Not only did he receive these, but he also received a guarantee of those and other protections when the Federal Government finally agreed, prior to the trial in this case, new procedures for sanction proceedings. Dr. Oster is, therefore, a prevailing party.

This conclusion is amply supported by the facts. In May, 1986, Dr. Oster tried on numerous occasions to obtain his rights from the defendants. His entreaties were met with adamant refusals. The MSVRO's refusal to afford him his constitutional rights compelled Dr. Oster to file his lawsuit on June 4, 1986. The court

commented that the MSVRO's procedures appeared to be a kangaroo court. Appendix O, pages O-1 to O-2. The restraining order was the only reason that MSVRO did not proceed with the constitutionally deficient hearing. Thus, even in the nascent stages of litigation, Dr. Oster prevailed.

Further proof that Dr. Oster prevailed is that at the June 25, 1986 hearing on his motion for a preliminary injunction, the MSVRO agreed to afford Dr. Oster some of the more important due process protections he has sought.

A final significant concession was made when the federal defendants issued new procedures on May 13, 1987, in Transmittal No. 15 to the Peer Review Organization Manual, effective May 13, 1987. These new procedures guaranteed that Dr. Oster would be entitled to

virtually all of the protections which he had originally sought.[5]

The concrete examples of the inequities and consequences suffered by Dr. Oster and the arguments of his counsel concerning the need for such changes played an integral role in the development of the defendants' new procedures.

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[5]Protections which Dr. Oster originally sought were: (1) meaningful assistance of an attorney; (2) burden of proof upon the Inspector General; (3) ability to present witnesses; (4) ability to seek and obtain continuances for good cause; (5) the ability to disclose patient records to expert witnesses; (6) assurance as to the objectivity of the members of the Quality Assurance Committee; (7) preparation of a verbatim transcript that is available to the physician; (8) presence at the Quality Assurance Committee hearing of the physician who initially concluded that the medicare obligations were violated; (9) ability to submit additional information to the peer review organization; (10) assurance that the Quality Assurance Committee will articulate the factual basis for any adverse conclusions; (11) modification of the 30-day notice letter to the physician

initiating sanction proceedings.

Thus, regardless of which stage of the litigation is examined, Dr. Oster prevailed substantially. He prevailed even though the court did not reach final adjudication.[6]

The Federal defendants' refusal to settle justified an award of attorneys fees and costs. Forcing Dr. Oster to litigate in the first place because he was not afforded due process of law and then compelling him to continue the litigation to ensure future receipt of procedural

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[6]See Environmental Defense Fund, Inc. v. Watt, 554 F. Supp. 36, 39 (E.D.N.Y. 1982), Martin v. Heckler, 773 F. 2d 1145 (11th Cir. 1985) (plaintiff's lawsuit was a catalyst motivating the defendants to take remedial action that mooted statutory claims); Bonnes v. Long, 651 F. 2d 214 (4th Cir. 1981) (plaintiff's prevail under a consent order); Young v. Kenley, 641 F. 2d 192 (4th Cir. 1981) (plaintiff prevails in settlement agreement).

protections is not a justifiable position. Given the severe consequences of a medicare sanction and given the denial of any meaningful ability to defend, the chances of an erroneous privation was substantial.[7]

No doubt can exist that defendant's dogged refusal, prior to and during the litigation, to afford minimal due process was not justified.

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[7]The consequences of a medicare sanction are severe: (1) Termination of medicare provider status; (2) Notice to hospitals, nursing homes, and potential withdrawal of privileges; (3) Notice to professional organizations and injury to reputation and referral patterns; (4) Potential loss of insurance; (5) Notice to professional licensing boards and potential adverse licensing action; (6) Notice to health maintenance organizations, home health agencies and the state medicaid program and potential loss of provider status; (7) Notice to the public; (8) Injury to reputation; (9) Loss of income.

The Second Circuit has held that it is incumbent upon government to abandon its opposition to a plaintiff as soon as it becomes apparent that its litigation stance is not substantially justified. Environmental Defense Fund v. Watt, 722 F.2d 1081, 1086 (2d Cir. 1984). Dr. Oster submits that the Federal Government's litigation stance was never substantially justified, as demonstrated by entry of the temporary restraining order.

28 U.S.C. Section 2412(d)(1)(a) provides an exception to the award of fees if, "special circumstances make an award unjust." There are no special circumstances in this case which would make an award unjust.

The defendants bear the burden of proving that special circumstances exist which would make an award of fees unjust. Williams v. Miller, 620 F.2d 199 (8th Cir.

1980). And even if the defendants' actions were not taken in bad faith, their "good faith, lack of culpability, or prompt remedial action do not warrant a denial of fees under the special circumstances preclusion." Christiansburg Garmant v. E.E.O.C., 434 U.S. 412 (1978); Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985).

In Martin, the court cites Supreme Court of Virginia v. Consumer's Union of the United States, Inc., 446 U.S. 719 (1980), for the proposition that it is not a special circumstance that the state agency acted pursuant to federal regulation. It is also not a special circumstance that a state agency had no role in promulgating the regulations. Id. Logically, it must follow that these principles do not change when the agency is a federal one which has both promul-

gated and enforced the constitutionally defective regulations and directives.

4. Pursuant to the Common Law, Dr. Oster is entitled to an award in the amount of $138,996.58, payable solely by the Medical Society of Virginia Review Organization.

The MSVRO found no exigent circumstances or facts concerning Dr. Oster's competence that required an expedited review and decision. Thus no need existed for the notification of third parties prior to final action by the Inspector General.

Yet, on May 5, 1986, the MSVRO wrote Tidewater Memorial Hospital that the MSVRO had determined Dr. Oster to be a gross and flagrant violator. The MSVRO can offer no legitimate reason for this precipitous, premature, and exceedingly damaging notification. The notice is evidence of the MSVRO's malice, bad faith and oppressive reasons. Further evidence is

an attempt by MSVRO to use subterfuge to obtain privileged information in the case. Appendix Q, pages Q-1 to Q-4. Dr. Oster was denied basis fairness because he was not afforded certain procedural protections before the MSVRO.

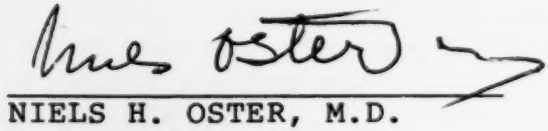
While preparing responses to MSVRO allegations, Dr. Oster learned that some of the due process protections he sought, but had been denied, were guaranteed to him in the contract between the MSVRO and the federal defendants. This is clearly evidence of bad faith or oppressive reasons.

MSVRO's failure to give Dr. Oster notification that they were withdrawing one of the seven cases of alleged substandard care compelled him (Dr. Oster) to devote his limited energies and resources to the defense of a case that did not constitute any type of violation.

CONCLUSION

Notwithstanding the foregoing, the Court of Appeals for the 4th Circuit denied the case because of untimely filing. The effect of the decision of the Court of Appeals for the Fourth Circuit is to deny Dr. Oster recovery of substantial damages which are clearly and quite expectantly caused by MSVRO and the Federal Government's improper actions. The petition for a writ of certiorari should be granted.

Respectfully submitted,



NIELS H. OSTER, M.D.
Counsel Pro Se
P. O. Box 835
Essex Square
Tappahannock, VA 22560
(804) 443-5311

December, 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH COURT

No. 88-2065

NIELS H. OSTER, M.D.

Plaintiff - Appellant

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES; RICHARD P. KUSSERON; THE MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION, INC.

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge.
(C/A No. 86-0344)

Submitted: June 30, 1988

Decided: September 15, 1988

Before HALL, PHILLIPS, and MURNAGHAN, Circuit Judges.

Niels H. Oster, Appellant Pro Se. Jessica Sanders Jones, Joseph Marvin Spivey, III, Douglas Granger (HUNTON & WILLIAMS); Robert William Jaspen (OFFICE OF THE U.S. ATTORNEY) for Appellees.

PER CURIAM:

Niels H. Oster, M.D., noted this appeal outside the 60-day appeal period established by Fed. R. App. P. 4(a)(1) for cases in which an officer of the United States is a party. He also failed to move for an extension of the appeal period within the additional 30-day period provided by Fed. R. App. P. 4(a)(5). The time periods established by Fed. R. App. P. 4 are "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)). Appellant's failure to note a timely appeal or obtain

an extension of the appeal period deprives this Court of jurisdiction to consider this case. See Shah v. Hutto, 722 F.2d 1167 (4th Cir. 1983) (en banc), cert. denied, 466 U.S. 975 (1984). We therefore grant the motions to dismiss this appeal. We dispense with oral argument because the dispositive issues recently have been decided authoritatively.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D., Plaintiff,	)	
	)	Civil Action No.
v.	)	86-0344-R
	)	
OTIS R. BOWEN, M.D., et al., Defendants.	)	

ORDER

The Court is in receipt of plaintiff's motion for reconsideration of the Court's January 13, 1988 Memorandum and Order denying plaintiff's motion for attorneys' fees and costs. Deeming it proper so to do, it is ADJUDGED and ORDERED that plaintiff's motion for reconsideration be and the same hereby is DENIED.

Let the Clerk send copies of this Order to the plaintiff and counsel of

record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

6/7/88
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D., Plaintiff,	)	
v.	)	Civil Action No. 86-0344-R
OTIS R. BOWEN, M.D., et al., Defendants.	)	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED that plaintiff Niels Oster's Motion for An Award of Attorney's Fees and Costs be and the same hereby is DENIED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel on record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/13/88
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D., Plaintiff,	)	
v.	)	Civil Action No. 86-0344-R
OTIS R. BOWEN, M.D., et al., Defendants.	)	

MEMORANDUM

This matter comes before the Court on Plaintiff Niels Oster's motion for an award of attorneys' fees and costs. Plaintiff's motion is premised on two provisions of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Section 2412(b) and 28 U.S.C. Section 2412(d)(1)(A), and the common law doctrines of common benefit and bad faith. The issues have been briefed and argued, and the matter is now ripe for disposition.

Background

Plaintiff filed this motion on June

4, 1986, against the Secretary and the Inspector General of the United States Department of Health and Human Services (collectively the "federal defendants"), and the Medical Society of Virginia Review Organization ("MSVRO"), seeking declaratory and injunctive relief concerning the use of peer review organizations to sanction physicians participating in the Medicare Program. Plaintiff claimed that the particular procedures utilized by the MSVRO in reviewing the plaintiff's professional activities under the Medicare program violated the plaintiff's rights of due process and equal protection under the United States Constitution and the Federal Administrative Process Act. MSVRO is a peer review organization ("PRO") acting under contract with the defendant Secretary of Health and Human Services.

MSVRO is obligated by the contract to abide by program directives issued by the Secretary and the defendant Inspector General of Health and Human Services.

Plaintiff is a physician licensed and practicing medicine in Virginia. In August of 1985, MSVRO notified plaintiff that it had identified one of his cases, after applying a set of standardized screening criteria, as warranting additional review. On March 21, 1986, after discussing the case with plaintiff, MSVRO advised him that it would review retrospectively at least 15-20 cases of his, due to its concerns with respect to his treatment decisions in the first case investigated.

On May 2, 1986, the MSVRO informed plaintiff by letter that it had determined that he had in six cases grossly and flagrantly violated his obligation to

provide services of a quality meeting professionally recognized standards of health care. The letter strongly recommended that plaintiff appear at a meeting with the MSVRO Quality Assurance Committee ("QAC") on June 4, 1986. The MSVRO denied plaintiff's request for a continuance of that proceeding.

Plaintiff was informed that his counsel would be permitted to attend but not speak at the June 4 proceeding. Plaintiff's request to have expert witnesses testify in his behalf was denied. The scheduled proceeding was postponed when plaintiff filed this action on June 4, 1986 and this Court entered a temporary restraining order. The parties subsequently agreed to certain procedural changes for the postponed hearing, which included permission for plaintiff's counsel to make statements, and allowance

of expert testimony on plaintiff's behalf.

The federal defendants promulgated Transmittal No. 15 to the Peer Review Organization Manual, effective May 13, 1987. Transmittal 15 effected changes in the PRO sanction process, certain of which concerned procedures that were the subject of the instant action. The case had come on for trial on the merits on April 21, 1987, and had been continued generally following opening statements and presentation of evidence by the plaintiff. Following the promulgation of Transmittal 15, plaintiff filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 41(a)(2). The Court dismissed this action without prejudice on October 20, 1987.

Discussion

In his motion for attorney's fees and costs, the plaintiff seeks an award under

both the EAJA and common law doctrines. The federal defendants contend that plaintiff's motion should be denied because the Court is without jurisdiction over the matter, the plaintiff is not a prevailing party against the United States under the EAJA, the position of the United States was substantially justified, the plaintiff may not recover under the common benefit rule, and the federal defendants did not act in bad faith. Defendant MSVRO argues that it is not a federal agency under the EAJA, the Court is without jurisdiction over this matter, the plaintiff did not prevail in the litigation, the position of MSVRO was substantially justified, and common law theories of attorney fee liability are inapplicable.

I. Equal Access to Justice Act

The plaintiff has moved for an award

of attorneys' fees and costs under the EAJA, 28 U.S.C. Section 2412. The EAJA provides that the Court may assess liability for fees against the United States under Section 2412(b) "to the same extent that any other party would be liable under the common law." In addition, Section 2412(d)(1)(A) provides that in certain circumstances a court "shall" award attorneys' fees against the United States "to a prevailing party . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." Under both of these subsections of the EAJA, the litigation for which a fee award is sought must have been commenced in a court having jurisdiction over the action, the party receiving the award must have prevailed in the litigation, and the party against

which the award is assessed must be the United States or an agency or official thereof.

A. Federal Defendants

The federal defendants argue that an award under Section 2412 (d)(1)(A) is improper for a number of reasons. It is unnecessary to address each of these issues, however, because the Court finds the position of the federal defendants in this action to have been substantially justified.

The position of the federal defendants in this litigation has been that this Court lacks jurisdiction over the action, and that the procedures utilized by the MSVRO to determine whether plaintiff had met his obligations under the Medicare program were not deficient. The reasonableness of the federal defendants' position has been clearly

demonstrated by the Fourth Circuit's recent decision in Varandani v. Bowen, 824 F.2d 304 (4th Cir. 1987).

With a remarkably similar fact pattern, the Varandani opinion indicated that a colorable procedural due process claim sufficient to establish jurisdiction prior to exhaustion of administrative remedies was not made out where the physician received notice of the impending suspension, had an opportunity to respond in writing, and had an opportunity to respond in person at an informal hearing. 824 F.2d at 310. Furthermore, the Court ruled against Dr. Varandani, whose attorney was permitted to appear but not speak at the informal hearing, on the merits of his due process claim. Id.at 311. The Court held that a doctor is entitled to neither an evidentiary hearing nor a full adversary proceeding before

being suspended from participation in Medicare. Id.at 310-11.

Although the Varandani decision does not directly address each of the specific procedural deficiencies alleged by the plaintiff, the Fourth Circuit's ruling clearly demonstrates that the federal defendants had a reasonable basis for their legal theories, see Washington v. Heckler, 756 F.2d 959, 961-62 (3d Cir. 1985), and that their position was substantially justified under the EAJA.

An award of fees against the federal defendants, in light of the facts in this case, would also be improper under 28 U.S.C. Section 2412(b). Section 2412(b) allows for a fee assessment against the United States "to the same extent any other party would be liable under the common law." Plaintiff seeks to recover by the common benefit and bad faith

exceptions to the general "American Rule" against the award of costs and fees. See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

The nature of the common benefit exception makes it generally unsuitable as a means to award fees against the United States. This Court finds the reasoning of the D.C. Circuit in Grace v. Burger, 763 F.2d 457 (D.C. Cir. 1985) to be persuasive. See also, Trujillo v. Heckler, 587 F. Supp. 928 (D. Colo. 1984). Judge Ginsburg, in Burger at 459, noted that the common benefit theory has been used to impose fees on a corporate or union defendant when the benefits of a named plaintiff's victory were spread among shareholders or union members. In contrast, an award of fees in this case would not compel beneficiaries to compensate a winning litigant who acted as

their representative, but rather would assess costs against a party unrelated to any potential beneficiary. Id. at 460. The common benefit exception is therefore not applicable to this situation.

An award of fees under the bad faith exception to the American rule would, in the instant case, be inappropriate because of the absence of demonstrable bad faith on the part of the federal government.

B. MSVRO

The EAJA plainly states that it applies only to the United States, a federal agency, or a federal official acting in his or her official capacity. The act does not provide for an award against a private entity that contracts with the government pursuant to a federal program.

Cases involving the Federal Tort Claims Act and the Freedom of Information

Act have discussed the characteristics of a "federal agency." In United States v. Orleans, 425 U.S. 807 (1976), the Supreme Court held that a community action agency funded under the Economic Opportunity Act was not a federal agency under the FTCA. The Court, in reaching its decision, noted that "a critical element in distinguishing an agency from a contractor is the power of the federal government 'to control the detailed physical performance of the contractor'." 425 U.S. at 814 (quoting Logue v. United States, 412 U.S. 521, 528 (1973). MSVRO is an independent legal entity which contracts with the federal government and whose day-to-day operations are supervised by private employees paid by MSVRO.

In Public Citizen Health Research Group v. Department of Health, Education and Welfare, 668 F.2d 537 (D.C. Cir.

1981), the court determined that a professional standards review organization, the predecessor to PROs under 42 U.S.C. Section 1320 et seq., was not a federal agency under the FOIA. The court noted it was the "fixed purpose of Congress that PSROs should be independent medical organizations operated by practicing physicians in the private sector, and not government agencies run by government employees." 688 F.2d at 543.

MSVRO is simply not a part of the federal government in the form of an agency. It is rather a private corporation without the enormous litigation resources available to the United States. See Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1086 (2d Cir. 1983). Therefore, fees may not be awarded against MSVRO under the EAJA.

II. Common Law Doctrines

The plaintiff has also moved for an award of attorneys fees and costs against MSVRO under the common law doctrines of common benefit and bad faith. As discussed earlier, under the traditional "American Rule," a litigant is not entitled to reimbursement for attorneys fees and costs absent one of the specific exceptions to the rule.

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) provides a thorough description of the common benefit exception to the American Rule. Under Mills, a successful litigant may recover attorneys' fees where

> the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes

possible an award that will operate to spread the costs proportionately among them.

396 U.S. at 393-94. In Virginia Hospital Association v. Kenley, 74 F.R.D. 417, 419-20 (E.D. Va. 1977), this Court identified the three distinct requirements imposed by Mills on claims under the common benefit rule: (1) a substantial fund or benefit must have been produced by the efforts of the plaintiff; (2) the benefit must have been conferred on an ascertainable class; and (3) a fee award would allow the Court to spread the costs of procuring the benefit among the class.

Even if the Court could find that a substantial benefits has been conferred on the physician-members of the MSVRO, as plaintiff contends, a fee award against MSVRO would not serve to spread the costs among these putative beneficiaries. Where

the common benefit rule is invoked against a stock corporation or a union, the beneficiaries may incur their share of the costs by such means as reduced dividends or higher union dues. MSVRO, however, is a non-stock corporation. Plaintiff has demonstrated no financial relationship whatsoever between MSVRO and the physicians who may benefit from the new procedures. Having failed to establish a relationship by which an award would spread the costs of achieving any substantial benefit to the class of beneficiaries, plaintiff may not recover fees under the common benefit doctrine.

Finally, the Court may not award plaintiff fees against MSVRO under the bad faith exception to the American Rule because the plaintiff has not demonstrated bad faith on the part of MSVRO.

Conclusion

For the foregoing reasons, the Court will not award attorneys' fees and costs against the federal defendants or MSVRO under the EAJA or common law doctrines.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/13/88
Date

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D., Plaintiff,	)	
v.	)	
OTIS R. BOWEN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;	)	Civil Action No. 86-0344-R
RICHARD P. KUSSEROW, DIRECTOR GENERAL, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND	)	
MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION, Defendants.	)	

ORDER

The Court is in possession of plaintiff's motion to dismiss this action on the grounds that the defendants have adopted new procedures, thereby providing Dr. Oster with the relief he sought.

Finding it just and proper so to do, the Court hereby ORDERS and ADJUDGES that this action be dismissed without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

10/20/87
Date

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Niels Oster, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Otis R. Bowen, M.D., Secretary, United States Department of Health and Human Services;	)	Civil Action No. 86-0344-R
	)	
Richard P. Kusserow, Inspector General, United States Department of Health and Human Services; and	)	
	)	
Medical Society of Virginia Review Organization,	)	
	)	
Defendants.	)	

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

1. This action challenges the manner in which the Medical Society of Virginia Review Organization (MSVRO) conducts

utilization and quality control peer review as required by 42 U.S.C. 1320(c) and 42 U.S.C. Section 1395y(g).

2. The plaintiff is Niels Oster, M.D.

3. Dr. Oster practices medicine and general surgery in Tappahannock, Virginia and has privileges at Tidewater Memorial Hospital.

4. Approximately 65% of Dr. Oster's patients are Medicare beneficiaries.

5. Dr. Oster is also the medical director of two nursing facilities whose residents are primarily Medicare beneficiaries.

6. The defendant Otis R. Bowen, M.D., is Secretary of the U.S. Department of Health and Human Services (hereinafter referred to as the "Secretary").

7. Defendant Richard P. Kusserow is Inspector General of the Department of

Health and Human Services and heads the Office of Inspector General (hereinafter referred to as the "OIG").

8. Defendant Medical Society of Virginia Review Organization (hereinafter referred to as "MSVRO") is the entity in Virginia that conducts utilization and quality control peer review for the U.S. Department of Health and Human Services in its administration of the Medicare program.

Jurisdiction

9. Jurisdiction is alleged alternatively first under 42 U.S.C. Section 405(g) and secondly under 28 U.S.C. Section 1331.

10. 42 U.S.C. Section 405(g) normally requires exhaustion of administrative remedies and a final decision from the Secretary after a hearing. The Supreme Court has held that the exhaustion

requirement is waivable, whereas the final decision requirement is non-waivable. Weinberger v. Salfi, 422 U.S. 749 (1975); Matthews v. Eldridge, 424 U.S. 319 (1976).

11. The Secretary has not in this case waived the exhaustion requirement although he may do so if he deems exhaustion to be futile. Matthews v. Diaz, 426 U.S. 67, 76-77 (1976). The Supreme Court has also held that deference to the Secretary's view concerning exhaustion is not always appropriate. Matthews v. Eldridge, 424 U.S. at 329-330; Heckler v. Ringer, _____ U.S. _____, 80 L.Ed.2d 622, 638 (1984). Federal courts may take jurisdiction where a plaintiff has raised a constitutional challenge that is collateral to his claim for benefits. Matthews v. Eldridge, 424 U.S. at 319.

12. Dr. Oster's constitutional challenge in this case is collateral to

any claims; therefore, the exhaustion requirement of 42 U.S.C. Section 405(g) is waived.

13. Precedent for asserting jurisdiction in cases involving efforts of the Secretary to exclude or otherwise sanction physician providers in the Medicare program or such providers that have not exhausted available administrative remedies include Geoffrey Richstone v. Heckler, 84 Civ. 2640 (U.S.D.C., S.D.N.Y.) (slip op., June 4, 1984) and Sheepshead Nursing Home v. Heckler, 84 Civ. 6649 (S.D.N.Y. October 17, 1984).

14. "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." Califano v. Sanders, 430 U.S.

99, 109 (1977).

15. "Again, the court does not consider a lack of complete exhaustion leading to a final administrative decision and a 405(g) appeal to be controlling for jurisdictional purposes in a case such as this involving colorable constitutional claims. . . Instead, the court suggests that a due process challenge would seem to require some factual assertion that the administrative mechanism is incapable of addressing such alleged abuses. "Adams v. Heckler, 566 F.Supp. 1047, 1056 n.7 (W.D.Va. 1983).

16. Regarding the requirement for a decision, the MSVRO, as agent for the Secretary, has already determined that Dr. Oster has grossly and flagrantly violated his obligations to the Medicare Program. See Letter, dated May 2, 1986, from Dr. Poutasse to Dr. Oster. The Supreme Court

has held that the final decision requirement can be satisfied by decisions of persons or organizations subordinate to the Secretary. Weinberger v. Salfi, 422 U.S. at 766-767. Therefore, the May 2, 1986, letter satisfies the non-waivable requirement of 42 U.S.C. Section 405(g). Therefore, the court has jurisdiction.

17. Alternatively, the court has jurisdiction under 28 U.S.C. Section 1331. The Supreme Court held in Weinberger v. Salfi that claimants for Social Security benefits may not assert federal question jurisdiction under 28 U.S.C. Section 1331 because 42 U.S.C. Section 405(h) specifically prohibits use of that jurisdictional statute. 422 U.S. at 757.

18. 42 U.S.C. Section 1320c-5(b)(4), however, incorporates only the provisions of 42 U.S.C. Sections 405(b) and 405(g) for use in the peer review organization

program. The statute does not incorporate 42 U.S.C. Section 405(h) and its prohibition concerning 28 U.S.C. Section 1331. Therefore, jurisdiction may be asserted under 28 U.S.C. Section 1331.

19. In addition, the statutory scheme set forth in 42 U.S.C. Section 405 was designed for situations where beneficiaries or applicants for benefits desired to appeal. Good policy reasons exist in those kinds of situations for Congress to conclude that 28 U.S.C. Section 1331 should not be available for jurisdiction.

20. Dr. Oster's case, on the other hand, is different. He is not seeking benefits in the way envisioned by the Congress when it enacted 42 U.S.C. Section 405. Dr. Oster is seeking to preserve and protect the valuable liberty interest and property interests he has in pursuing his

chosen profession. Thus, Congress' partial incorporation of the appeals system specified in 42 U.S.C. Section 405, specifically only Sections 405(g) and 405(b), reinforces the conclusion that Congress did not intend to adopt the entire statutory scheme of 42 U.S.C. Section 405 for use in the peer review organization program. Clearly, Congress, by being selective, intended to allow plaintiffs like Dr. Oster to assert federal question jurisdiction.

Background of the PRO Program

21. The Peer Review Improvement Act of 1982, Title I, Subtitle C of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248 (hereinafter referred to as "TEFRA") provided for the implementation and operation of a review system to eliminate unreasonable, unnecessary, or inappropriate care to

Medicare beneficiaries, and to promote the quality of services of the type for which payment may be made, in whole or in part, under Title XVIII of the Social Security Act (the Act). The review function is carried out by a Utilization and Quality Control Peer Review Organization (hereinafter PRO).

22. The Medicare Prospective Payment System (PPS), mandated by the Social Security Act Amendments of 1983 (Title VI, Prospective Payments for Medicare Inpatient Hospital Services, Public Law 98-21), required acute care hospitals seeking Medicare reimbursement under those amendments to enter into contracts with PROs no later than November 15, 1984, to perform the following PRO functions: (1) review of the reasonableness, necessity and appropriateness of hospital admissions; (2) review of the

completeness, adequacy, and quality of care provided; (3) validation of diagnoses and procedural information that determine Medicare reimbursement; and (4) review of the necessity and appropriateness of care for which payment is sought on an "outlier" basis.

23. The purpose of the new PPS is to change hospital behavior through financial incentives under Medicare to encourage more efficient medical management of health and medical care by doctors and hospitals. Prospective payment incentives require new strategies focus on the effect rather than on the process of health care delivery.

24. The Act requires that the Secretary enter into contracts with private contractors for the review of the quality, necessity, reasonableness and appropriateness of health care services

furnished under Medicare. These contractors will be responsible for review in specified, primarily statewide geographic areas. The contracts are to include objectives to be achieved during the contract period.

25. The Secretary entered into such a contract with the MSVRO on October 15, 1984.

26. The function of the MSVRO is to review, subject to the terms of its contract with the Secretary, Virginia physicians and other Virginia health care providers providing services for which payment is made in whole or in part under the Medicare program for the purposes of determining whether:

(a) such services and items are or were reasonable and medically necessary;

(b) the quality of such services

meets professionally recognized standards of health care; and

(c) in case such services and items are proposed to be provided in a hospital or other health care facility on an inpatient basis, such services and items could, consistent with the provision of appropriate medical care, be effectively provided more economically on an outpatient basis or in an inpatient health care facility of a different type. 42 U.S.C. Section 1320c-3.

27. The Secretary's contract with the MSVRO requires the MSVRO to meet the "outcome oriented objectives" set out in the contract. One of the objectives in Virginia is to reduce unnecessary hospital readmissions resulting from substandard

care provided during the prior admissions. By contract, the MSVRO has agreed to reduce the number of unnecessary readmissions due to premature discharge by 33.3% or 254 cases over the life of the contract. Other "objectives" include 1) reducing the number of deaths from acute myocardial infarction by 86 during each year of the contract period to bring Virginia's mortality rate to the national average; 2) reducing the incidence of post-operative complications by 75% (1,156 cases) by the end of the first year and by 90% (1,387 cases) by the end of the second year.

28. By contract, the MSVRO is also responsible for initiating sanction recommendations as specified in Section 1156 of the ACT (42 U.S.C. 1320c) and 42 C.F.R. Part 474.

The Sanction Process

29. Any health care practitioner and any other person (including a hospital or other health care facility, organization or agency) who furnishes or orders health care services for which payment may be made (in whole or in part) under the Medicare program has an obligation to ensure, to the extend of authority, that such services:

(a) will be provided economically and only when, and to the extent, medically necessary;

(b) will be of a quality that meets professionally recognized standards of health care; and

(c) will be supported by evidence of medical necessity and quality in such form and fashion and at such time as may reasonably be required by a reviewing peer

review organization in the exercise of its duties and responsibilities. 42 U.S.C. 1320c-5; 42 CFR Section 474.30.

30. As part of its agreement with the Secretary, the MSVRO reviews hospital admissions, procedures and transfers to ensure that hospitals and physicians are meeting their obligations under the Act.

31. The MSVRO is organized in such a fashion that the initial review of hospital records is conducted by a nurse or medical record technician employed by the MSVRO. If the initial reviewer determines that a given record suggests substandard medical care, the record is referred to a physician for review. If the physician review concurs that the care rendered in the case was substandard, he refers the case to one of six Regional Review Committees. The physician reviewer

is not necessarily a specialist in the same area of medicine as the physician whose care is being questioned. The Regional Review Committee determines whether a practitioner has violated his obligations under the Act.

32. There are two types of violations sufficient to warrant sanction under the Act: (1) a "substantial violation in a substantial number of cases" and (2) a "gross and flagrant" violation.

33. "A substantial violation in a substantial number of cases" means a pattern of care has been provided that is unnecessary, inappropriate, or does not meet recognized standards of care or is not supported by necessary documentation. 42 CFR Section 474.0.

34. A "gross and flagrant" violation means a violation of an obligation has

occurred in one or more instances which presents an imminent danger to the health, safety or well-being of a Medicare beneficiary or places the beneficiary unnecessarily in a high risk situation.

35. If the Regional Review Committee concludes that a "gross and flagrant" violation of an obligation has occurred, it refers the matter to the Quality Assurance Committee of the MSVRO for review.

36. The Medical Director of the MSVRO analyzes all information pertaining to a case in which a gross and flagrant violation has been found by the Regional Review Committee, ascertains whether due process has been followed, and he prepares a written notice.

37. The Health Care Financing Administration (HCFA) of the U.S. Department of Health and Human Services

has developed a Peer Review Organization manual that provides PROs, including the MSVRO, with procedures for identifying statutory violations, for reviewing materials related to those violations, and for preparing sanction recommendations.

38. Transmittal No. 6 of the Peer Review Organization Manual effective October 1, 1985, (hereinafter referred to as "Transmittal 6") contains the following instructions to PROs where a PRO determines that a gross and flagrant violation has occurred:

6020. SANCTION PROCEDURES FOR GROSS AND FLAGRANT VIOLATIONS

A. Notification by the PRO to the Practitioner or Other Person. -- If a gross and flagrant violation is determined, do not provide the practitioner or other person with the initial notice or a period of correction, if appropriate, that would have been

provided if a substantial violation in a substantial number of cases had been determined. In this case, you must immediately send the practitioner or other person the following:

1. A written notice (see Exhibits 5 and 6) containing:

a. The determination of a violation;

b. The obligation violated;

c. The basis for the determination;

d. The sanction which you will recommend to the OIG;

e. The right of the practitioner or other person to submit to the PRO within 30 days of the date of receipt of the notice, additional information or a written request for a meeting with the PRO to discuss the determination, or both. The date of

receipt is presumed to be 5 days after the date on the notice, unless there is a reasonable showing to the contrary.

2. A copy of the material which you used in arriving at your determination.

39. Exhibit 5 referred to in Transmittal 6 is a model letter prepared by the government for use by the PRO. It is set forth in its entirety below:

Exhibit 5

PRO SANCTION - MODEL LETTER - 30 DAY

(Gross and Flagrant Violations Only)

(Name and Address of Practitioner) or

(Provider)

Dear Dr. _____: or (Dear Mr. _____:)

Section 1156 of the Social Security Act imposes certain obligations upon health care practitioners and other persons who furnish or order services under Medicare. These obligations are to assure that the

services are: (1) provided economically and only when, and to the extent they are medically necessary; (2) of a quality that meets professionally recognized standards of health care; and (3) supported by the appropriate evidence of medical necessity and quality of the service in a form and fashion as may be required.

The responsibility and authority to review such health care services has been delegated to the (Name of Pro) by the Secretary of the Department of Health and Human Services. Section 1156(b) of the Social Security Act states that a practitioner's or other person's failure to comply substantially with any of these obligations in a substantial number of cases or a gross and flagrant violation of any such obligation in one or more instances must be reported to the Secretary by the PRO, along with a

recommendation for appropriate sanction actions. These sanctions may include a removal of eligibility to provide health care services to program patients on a reimbursable basis either permanently or temporarily. Alternatively, recovery of the actual or estimated cost of such medically improper or unnecessary services may be required as a condition for continued eligibility to receive reimbursement under the program.

The (Name of PRO) has reviewed medical records pertaining to your medical practice) or (to the health care services or items furnished in your hospital). As a result of this review, the (Name of PRO) has determined that you have (your hospital has) grossly and flagrantly violated your (its) obligations under Section 1156 of the Social Security Act.

A copy of the material used by the

(Name of PRO) in arriving at this determination is enclosed. Also enclosed is a case synopsis identifying each case reviewed by the (Name of PRO), the issues raised by the (Name of PRO), and a final determination by (Name of PRO).

[See Exhibit 6 for Synopsis of Cases]

It has also been determined that the violations of your obligations under Section 1156 of the Social Security Act are serious enough to warrant recommending to the Department of Health and Human Services that sanctions be imposed on you pursuant to Federal statute and regulations. The sanction to be recommended is [exclusion from participation in the Medicare program (for a period of _____ years)] or [that you pay to the Government of the United States a monetary penalty in the amount of _____ as a condition for your

continued participation in the Medicare program].

By this letter you are hereby formally invited to submit to the (Name of PRO) within 30 days of the date of this letter, additional information which you feel might modify its position and/or a written request to meet with us to review and discuss case specifics.

40. The "30-day letter" the MSVRO issued to Dr. Oster, giving him 30 days to appear before the Quality Assurance Committee of the MSVRO on charges of having grossly and flagrantly violated his obligations under the Act is substantially identical to the model letter set forth in Exhibit 5 to Transmittal 6. See Exhibit A to Complaint.

41. Exhibit 6 referred to in Transmittal 6 contains a form to use to summarize the cases which a PRO finds

constitute a violation of an obligation under the Act.

42. The summary of cases the MSVRO transmitted to Dr. Oster is substantially identical in form and content to the form prepared by HCFA for use in cases of a gross and flagrant violation.

43. As set forth in Transmittal 6, and as implemented by the MSVRO, a practitioner has 30 days from receipt of the "30-day letter" to appear before the PRO and defend himself against the charge(s) of having grossly and flagrantly violated his obligations under the Act.

44. The Quality Assurance Committee (QAC) of the MSVRO, which is composed of 9 practitioners, meets with and reviews the material submitted by the practitioner in response to the 30 day letter. The QAC consists of the Medical Director of the MSVRO and eight physicians. All regions

are represented on the QAC.

45. According to MSVRO procedures, the QAC issues the 30-day sanction notice, meets with the "violator," and determines after such meeting if the physician or provider has rebutted successfully the determination that the physician committed a gross and flagrant violation. If the QAC determines that the physician or provider failed to rebut the determination, it recommends a sanction to the MSVRO Board.

46. There are two possible sanctions: (1) exclusion from the Medicare program or (2) imposition of a monetary penalty.

47. The MSVRO Board does not meet with the affected practitioner; nor does it review a transcription of the proceedings conducted between the QAC and the provider. Normally, the MSVRO Board

is extraordinarily deferential to the QAC's decision and recommendation.

48. If the MSVRO Board accepts the sanction recommended by the QAC, it must submit its report and recommendation of sanction to the OIG. The MSVRO sends the affected practitioner or other person a concurrent final notice, with a copy of the MSVRO report that is being forwarded to the OIG, advising the practitioner that the MSVRO recommendation of sanction has been submitted to the OIG. 42 CFR Section 474.39.

49. An adverse MSVRO recommendation to the OIG must be based on a consideration of:

(a) the type of offense involved;

(b) the severity of the offense;

(c) the deterrent value;

(d) the practitioner's previous sanction record;

(e) the availability of alternative sources of services in the community; and

(f) any other factors that the MSVRO considers relevant (for example, the duration of the problem).

50. The practitioner has 30 days from receipt of the final MSVRO notice to submit any additional written material to the OIG.

51. Due to the 120-day statutory requirement specified at 42 CFR Section 474.42(e), the 30-day period for submitting additional information to the OIG will not be extended and any material received by the OIG after the 30-day period will not be considered. There is no opportunity for a practitioner to meet with the OIG.

52. The OIG will review the MSVRO report and recommendation to determine whether:

(a) The MSVRO is following its procedures;

(b) a violation has occurred; and

(c) the practitioner has demonstrated an unwillingness or lack of ability to comply with an obligation.

53. If the OIG decides that a sanction is not warranted, it will notify the MSVRO and the affected practitioner that the recommendation of sanction is rejected.

54. If the OIG decides that a violation of an obligation has occurred, it will determine the appropriate sanction by considering:

(a) the recommendation of the MSVRO;

(b) the type of offense;

(c) the severity of the offense;

(d) the previous sanction record of the practitioner or other person;

(e) the availability of alternative sources of services in the community;

(f) any prior problems the Medicare carrier or intermediary has had with the practitioner or other person;

(g) whether the practitioner or other person is unable or unwilling to comply substantially with the obligations; and

(h) any other matters relevant to the particular case.

55. The OIG will notify the affected practitioner of any adverse determination and the sanction to be imposed. The sanction is effective fifteen days from receipt of the notice.

56. If the MSVRO submits a recommendation for exclusion from the Medicare program and the OIG makes no determination by the 120th day after actual receipt of the MSVRO recommendation, the exclusion sanction will become effective and the OIG will provide notice of such exclusion.

57. Concurrent with providing notice to the affected practitioner, the OIG will notify the public by publishing in a newspaper of general circulation in the MSVRO area, a notice that identifies the sanctioned practitioner, the obligation that has been violated, the sanction imposed, and if the sanction is exclusion, the effective date and duration of the exclusion. 42 CFR Section 489.53.

58. In addition to providing concurrent notice to the newspapers, the OIG will provide concurrent notice of the

sanction to:

(a) the MSVRO;

(b) PROs in adjacent areas;

(c) State medicaid fraud control units and State licensing bodies;

(d) appropriate medicare contractors and State agencies;

(e) hospitals, including the hospital where the sanctioned individual's case originated and where the individual currently has privileges, if known; skilled nursing facilities, home health agencies, and health maintenance organizations;

(f) medical societies and other professional organizations;

(g) Medicare carriers and intermediaries, health care prepayment plans, and other affected agencies and organizations.

59. The Secretary considers the

determination and notice of sanction by the OIG an "initial determination" for purpose of the administrative appeals procedure and any judicial review.

60. The OIG's determination of sanction goes into effect fifteen days after notice to the practitioner of the adverse determination and continues in effect unless reversed by a hearing decision. 42 CFR Section 474.58(a)(3).

61. Any material received by the OIG after the 30-day period following receipt of the MSVRO recommendation by the OIG will not be considered. 42 C.F.R. Section 474.58(a)(2).

62. A practitioner or other person dissatisfied with an OIG determination or an exclusion that results from a determination within 120 days is entitled to a hearing before an administrative law judge and may also request a review of

that decision by the Appeals Council. 42 CFR Section 474.58(a)(1).

63. Any information not transmitted to OIG within 30 days of an adverse PRO recommendation will not be subject to review by the administrative law judge or the Appeals Council. 42 CFR Section 474.58(a)(2)(ii).

64. Any practitioner or other person dissatisfied with a decision of the Appeals Council or an administrative law judge (if request for Appeals Council is denied), may file a civil action in accordance with the provisions of section 205(g) of the Social Security Act.

65. Administrative and judicial review is made on the basis of the administrative record created before the MSVRO and the OIG.

66. The relevant statutes governing the MSVRO proceedings are found at

42 U.S.C. 1320c through 42 U.S.C. 1320c-12.

67. The regulations governing the imposition of sanctions and the conduct of the MSVRO are found at 42 CFR, Part 474.

STATE SANCTIONS FOR PHYSICIANS

68. The governmental entity charged with ensuring the competency of physicians in the Commonwealth of Virginia is the Virginia State Board of Medicine. Section 54-274 to 54-321.2:1 of the Code of Virginia.

69. The State Board of Medicine is authorized by law to suspend summarily the license of any person licensed to practice medicine in Virginia if the Board finds that there is a substantial danger to the public health and safety which warrants such action. The Board is authorized to make such summary decisions by telephone

conference call if necessary. Section 54-318.3 of the Code of Virginia.

70. Because of the summary suspension authority vested in the Board of Medicine, the Board may quickly and effectively remove incompetent practitioners from practice.

71. The Virginia Board actively regulates and disciplines Virginia practitioners where appropriate. Where summary suspension is effected proceedings for a hearing are instituted simultaneously.

FACTS CONCERNING DR. OSTER

72. Dr. Niels Oster practices general medicine and surgery in Tappahannock, Virginia.

73. A naturalized American citizen, Dr. Oster received his pre-medical training at the Aarhus University School of Medicine in Denmark, (1948-1954) and

medical training at the Loma Linda University School of Medicine (1956-1961). He did a rotating internship in 1961-1962 and satisfactorily completed his surgical residency in the period of 1962 to 1966.

74. Dr. Oster is licensed to practice medicine in California and Virginia. No licensing board in either of those states has ever brought any disciplinary proceedings against him.

75. Dr. Oster has never been found guilty of medical malpractice in a court of law.

76. Dr. Oster's practice is composed of a large number of patients whose health care is subsidized or paid for by the federal Medicare program. He estimates that 65% of his regular patients are Medicare beneficiaries.

77. Dr. Oster is the medical director of two nursing homes, one of which

includes a home for adults. Both facilities are composed primarily of Medicare beneficiaries.

78. Forcible exclusion from the Medicare program will cause Dr. Oster to lose a significant portion of his livelihood; will compel him to give up his position at the nursing home; and may result in loss of medical privileges at his hospital. The newspaper notice of any sanction imposed and concomitant notice to the state licensing agencies, the Virginia Medical Society and other medical entities, will stigmatize him, will adversely affect the decision of other practitioners to refer patients to him, and will affect his ability to pursue the practice of medicine in a meaningful way, thereby causing him irreparable injury.

79. On May 2, 1986, the MSVRO sent Dr. Oster a 30-day Sanction Notice

(Exhibit A).

80. The notice informed Dr. Oster that the MSVRO Colonial Regional Review Committee had reviewed medical records pertaining to his medical practice.

81. On the basis of that review, the MSVRO determined that Dr. Oster had grossly and flagrantly violated his obligation to provide medical care consistent with the requirements of the Social Security Act with respect to seven patients.

82. The MSVRO advised Dr. Oster that the violations of his obligations under the Social Security Act were "serious enough to warrant recommending to the Department of Health and Human Services that sanctions be imposed on him." The MSVRO noted that "the sanction recommended is exclusion from participation in the medicare program or a monetary penalty may

be imposed."

83. The notice advised Dr. Oster that if he did "not feel that the care rendered in the cases discussed [were] in violation of [his] obligations of Section 1156 of the Social Security Act, [he] may, within 30 days of this notice submit additional information to the MSVRO Quality Assurance Committee or notify [the Medical Director of the MSVRO] that [he] will meet with the Committee on June 4, 1986. . . ."

84. The notice concluded with the following statement:

> The MSVRO strongly recommends that you meet with the Quality Assurance Committee. Failure to provide additional information or notify me of the intention to meet with the Quality Assurance Committee within thirty (30) days will automatically result in a sanction recommendation

to the Office of Inspector General.

85. Dr. Oster was aware, prior to May 2, 1986, that the MSVRO was reviewing his patients records. Dr. Oster had been contacted by the regional review committee to discuss one case. That meeting was cancelled due to weather conditions. The regional committee requested another meeting but Dr. Oster was to be in California at that time, and the regional committee was not willing to postpone the meeting. Accordingly, a telephone conference call was held between Dr. Oster and the regional committee.

86. Dr. Robert Morton, President of the MSVRO had orally told Dr. Oster previously that he should cooperate with the MSVRO because it was not a "firing squad." Thus, Dr. Oster believed that the nature of the MSVRO review was far less serious than it actually is.

87. The first time, however, that Dr. Oster was made officially aware that the MSVRO was reviewing his medical practice for possible exclusion from the Medicare program on the grounds that he had grossly and flagrantly violated his obligations under the Act was when he received the May 2, 1986 30-day notice.

88. The May 2, 1986 notice identified seven separate cases in which the MSVRO had found that Dr. Oster had violated his obligations under Section 1156 of the Social Security Act. The case summaries the MSVRO submitted to Dr. Oster are attached as Exhibit A to the Complaint; the name and Medicare numbers of the patients have been deleted from the attachment to protect their privacy.

89. The May 2, 1986 notice did not advise Dr. Oster whether:

(a) He could be represented by

counsel;

(b) He could have individuals testify on his behalf;

(c) He would be permitted to cross-examine the individuals who determined that he had violated his obligations under the Social Security Act.

90. The May 2, 1986 notice did not specify that the June 4, 1986 hearing would be Dr. Oster's only opportunity to meet with and confront his accusers and that all further proceedings would be based on the review of the administrative record established at the June 4, 1986 meeting except for documents submitted to the OIG within 30 days of an adverse MSVRO recommendation.

91. The May 2, 1986 notice did not specify that the details of any eventual sanction would be published in a newspaper of general circulation simultaneously with

the notice of sanction transmitted to him and that such newspaper notice would state the legal and factual basis for the sanction, the proposed effective date, and, if appropriate, the duration of the exclusion. The May 2 notice did not specify that the OIG would also provide notice of the sanction to the state licensing agency, appropriate Medicare carriers, the hospitals in which Dr. Oster has privileges, nursing homes, home health agencies, and health maintenance organizations with which Dr. Oster is affiliated as well as medical societies and other professional organizations, simultaneously with any notice of adverse action transmitted to him by the OIG.

92. The May 2, 1986 notice did not specify that the patients who are the subjects of the MSVRO proceedings, may have access to MSVRO materials concerning

the physician and the patient's case and the MSVRO's determination that he grossly and flagrantly violated acceptable standards of practice in caring for them. 42 CFR Section 476.132(a).

93. The May 2, 1986 notice did not specify that any sanction recommended by the MSVRO and accepted by the OIG would become effective 15 days after the OIG provides notice that a sanction will be imposed and that the provisions concerning newspaper notice and notice to other entities would be effective irrespective of whether administrative and judicial review is pursued.

94. The May 2, 1986 notice did not specify whether Dr. Oster or the MSVRO bore the burden of proof or what standard would be utilized to review the evidence received by the MSVRO.

95. On May 9, 1986, Mr. Freeman

Vaughan, the Executive Director of the MSVRO informed counsel for Dr. Oster that the MSVRO considered the June 4, 1986 hearing a medical proceeding, not a legal one, and that while the MSVRO would permit attorneys to attend the MSVRO hearings, counsel would not be permitted to speak. (Exhibit B)

- -

NOTE: Page 26 missing from original document.

- -

counsel or experts may actively participate in a doctor's defense before the MSVRO.

103. Rules and regulations governing PRO proceedings do not specify who bears the burden of proof in a proceeding before the MSVRO.

104. Despite the absence of an articulated rule governing burden of

proof, the MSVRO requires the affected practitioner to "rebut" the charges against him. The MSVRO does not, however, specify this burden to the practitioner in the 30-day notice.

105. No rules or regulations govern the standard by which the MSVRO will review the evidence or information it receives from the affected practitioner, from experts testifying in the physician's behalf, or from its own MSVRO reviewers.

106. The MSVRO has no mechanism in place or criteria to guide the means by which the "professionally recognized standard of health care" or "standard of quality" may be determined. It does not state what the standard is in either the 30-day notice or in its recommendation of sanction to the OIG.

107. The MSVRO has no mechanism in place and permits no opportunity for an

affected practitioner to cross-examine those who have found him in violation of a "professionally recognized standard of health care" or "standard of quality."

108. Dr. Oster has no adequate remedy at law.

CONCLUSIONS OF LAW

1. Dr. Oster has an important liberty interest and a property interest that are in jeopardy as a result of defendants actions.

2. Dr. Oster has been denied due process of law; the defendants' procedures are constitutionally defective.

3. Dr. Oster has demonstrated a strong likelihood of success on the merits.

4. The harm to Dr. Oster will be substantial if the preliminary injunction is not granted, whereas the harm to the

defendants if the injunction is granted is minimal. The harm to Dr. Oster will be irreparable if the injunction is not granted.

5. The public interest is served by ensuring the defendants act in accordance with the Constitution. Further, the public is protected by the Virginia State Board of Medicine from physicians whose practice poses an imminent threat.

6. Dr. Oster has satisfied all requirements for a preliminary injunction. Therefore, defendants will be enjoined from proceeding against Dr. Oster, pending trial and a final decision concerning Dr. Oster's complaint.

Respectively submitted,

NIELS OSTER, M.D.

/s/ By: Robert T. Adams
Counsel

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	86-0344-R
OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services;	)	
	)	
RICHARD P. KUSSEROW, Department of Health and Human Services;	)	
	)	
and	)	
	)	
MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. I am Niels Oster, the plaintiff in Oster v. Bowen, Civil Action No. 86-0344-R. I make this affidavit in support of my motion for attorneys fees

and costs. I have personal knowledge of the matters contained in this affidavit.

2. I have reviewed with my business manager and accountant my financial status. Based upon my discussions and my review of my financial situation, I do not have a new worth of two million dollars or more to the best of my knowledge.

Pursuant to 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and accurate.

/s/ Niels Oster

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	86-0344-R
OTIS R. BOWEN, M.D., et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF CARTER G. PHILLIPS

1. I am Carter G. Phillips, a partner in the law firm of Sidley & Austin. I have personal knowledge of the matters contained in this affidavit.

2. The American Medical Association (AMA) is a regular client of my firm.

3. As stated by Kirk Johnson, the General Counsel to the AMA, in an earlier affidavit filed in this matter, (Memorandum of the American Medical

Association, et al. In Support of the Motion to Intervene, filed March 2, 1987) the AMA in 1986 had become increasingly concerned with the lack of procedural fairness in the pre-and post-sanction procedures required by the U.S. Department of Health and Human Services in its administration of the peer review organization (PRO) provisions of the medicare program. The concern was generated by a number of complaints filed with the AMA about the sanction procedures. At the December 1986 AMA House of Delegates meeting, those complaints led to a resolution calling for AMA participation in an appropriate lawsuit challenging the constitutional adequacy of the federal regulatory process.

4. The AMA became aware of the Oster lawsuit on or about January 27, 1987.

After an expedited review of the Oster pleadings and analysis of the issues set forth in that case and consultation with Benjamin W. Heineman, Jr., a partner with Sidley & Austin who has since left the firm, and me, Mr. Johnson recommended to the AMA Board of Trustees that it seek to intervene in the Oster case.

5. The AMA Board of Trustees voted to approve seeking intervenor status for the AMA in the Oster case on February 21, 1987.

6. The AMA, through its legal counsel, was aware of other pending court cases in which to intervene. The AMA selected the Oster case as the vehicle by which to challenge the federal physician peer review sanction system because the Oster case raised most of the constitutional issues of concern to the AMA in an unusually compelling factual

setting: 1) the inadequacy of the notice, 2) the denial of the physician's rights, such as the right to an attorney, the right to a transcript, 3) the right to present expert witnesses, and the right to cross-examine adverse witnesses; 4) clarification of the standard and burden of proof, and 5) imposition of a severe sanction prior to affording minimal procedural fairness.

7. The AMA believed that the Oster case presented one of the first judicial opportunities to decide what process is constitutionally required by the U.S. Department of Health and Human Services in the medicare peer review system. The AMA believed that it could be a precedent-setting case and desired to use the Oster case to test the legal adequacy of the peer review program.

8. The AMA further believed that

intervening in the Oster case would be in the interest of its 280,000 members and that such intervention would be of interest of all physicians, present and future, who may be called before a peer review organization for a "discussion" relating to the alleged "gross and flagrant" violation of the relevant standard of care.

9. The AMA believed that the key facts in Oster were undisputed and could be the subject of stipulation and that the issue of necessary due process was fundamentally an issue of law. Accordingly, the AMA was prepared to limit its own discovery.

10. In the Complaint of the AMA as Intervenor, which the AMA filed on March 2, 1987, the AMA asked for an order declaring the existing regulations unconstitutional and enjoining the

Secretary of Health and Human Services from implementing the defective PRO sanction regulations.

11. In the first week of April, our firm was contacted by Mr. Terry S. Coleman, and attorney at HHS, who indicated that he had just read the AMA's complaint and proposed a meeting with officials of the Health Care Financing Administration (HCFA) to discuss the AMA's concerns with the peer review sanction process.

12. An initial meeting between HCFA officials and AMA representatives was scheduled for March 25, 1987.

13. I attended the March 25, 1987, meeting together with Kirk Johnson, the General Counsel for the AMA, and Julia Krebs-Markrich, counsel to Dr. Oster. Mr. Johnson and I desired that Mrs. Krebs-Markrich be present because of her

familiarity with the facts in the Oster case and because of her practical familiarity with the PRO sanction process. We specifically asked for and received permission for her to attend the March 25 meeting.

14. Mr. Johnson provided the attendees of the March 25 meeting with a detailed agenda setting forth the issues for discussion. The matters set forth on the AMA meeting agenda were identical to those set forth in the AMA's Complaint of Plaintiff's-Intervenors which had been filed in Oster case. Dr. William Roper, the administrator of the HCFA, Mr. James Patton, representing the Inspector General, Mr. Kusserow, and Dr. McCarty Thornton, one of the government's counsel in the Oster case, were present at the meeting, as were several others.

15. At no time prior to or during the

March 25 meeting did HCFA representatives take the initiative as to procedural changes that could be made, rather HCFA representatives responded to the issues identified on the AMA agenda at the March 25 meeting. As the meeting progressed, for approximately one hour, I perceived a willingness on the part of the HCFA officials present to consider changes along the lines of those proposed by the AMA in the peer review sanction process.

16. A subsequent meeting was scheduled for April 7, 1987, to discuss HCFA responses to the issues Mr. Johnson highlighted at the March 25 meeting.

17. The day prior to the April 7 meeting, the U.S. District Court for the Eastern District of Virginia denied the AMA's motion to intervene in the Oster case.

18. The April 7, 1987 meeting

nevertheless went forward as planned. I attended that meeting and heard Mr. Heineman advise Mr. Terry S. Coleman, an attorney at HHS, that the AMA would refile its lawsuit in the United States District Court for the District of Columbia later that week.

19. The AMA filed Oster v. Bowen in the District Court for the District of Columbia on April 9, 1987, several days after its motion to intervene in the Oster case was denied. The complaint in AMA v. Bowen was largely identical to the complaint the AMA sought to file in the Oster case.

20. Between April 7 and May 12, 1987, there were meetings to work out the language for the changes to the Peer Review Organization Manual. I believe I attended all but one of those meetings. The changes finally agreed upon and issued

as Transmittal 15 to the Peer Review Organization Manual were largely identical to the proposals for change made by Mr. Johnson at the March 25, 1987 meeting.

21. I have read Mr. Kusserow's affidavit in which he states that he instructed his staff to cease all contacts with the AMA after the AMA filed in Oster v. Bowen.

22. To the best of my knowledge, no such intent to cease discussion was relayed to me, Mr. Heineman or any other representative of the AMA. In fact, discussions between HCFA representatives, Mr. Heineman and me continued from March 25, 1987, through at least May 12, 1987. We contacted Mrs. Krebs-Markrich and Mr. Robert T. Adams throughout the negotiation process to seek their advice on particular issues that arose.

23. Transmittal 15, containing the

agreed upon changes to the Peer Review Organization Manual, was made public on May 13, 1987. It is my opinion that without the intervention papers filed by the AMA in Dr. Oster's case, and the subsequent complaint in the District Court in the District of Columbia, HCFA would not have made the changes to the Peer Review Organization Manual that it did when it did.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury, that the foregoing is true and accurate.

/s/ Carter G. Phillips

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	86-0344-R
OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services;	)	
	)	
RICHARD P. KUSSEROW, Department of Health and Human Services;	)	
	)	
and	)	
	)	
MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. I am Kirk B. Johnson, the General Counsel of the American Medical Association. I have held that position since May, 1984. I am providing this

affidavit in support of Dr. Niels Oster's motion for an award of attorneys fees and costs. I have personal knowledge of the matters contained within this affidavit.

2. In January, 1987, I was contacted by Mr. Robert T. Adams, one of Dr. Oster's counsel. Mr. Adams contacted me to determine whether any conflict of interest issue existed for a potential witness in Oster v. Bowen, Civil Action No. 86-0344-R (E.D.Va.). In the course of that conversation, I expressed interest in Dr. Oster's litigation because the American Medical Association was extremely concerned about the lack of fundamental due process protections in peer review organization sanction proceedings. In my work on behalf of the Association it was obvious to me that individual peer review organizations were unwilling to afford adequate due process protections and that

they followed the directives of the Federal Government in the sanction proceedings they conducted. Accordingly, I became convinced that litigation would be necessary to effect the necessary changes and Dr. Oster's lawsuit clearly presented the due process issues. The American Medical Association, consequently, attempted to intervene.

3. In the AMA's attempt to intervene, Dr. Oster's counsel were asked and did provide the American Medical Association and its trial counsel with valuable information, advice, and insight into the peer review organization sanction process. Dr. Oster's counsel met with the American Medical Association's trial counsel, and they reviewed and commented upon the pleadings that were filed by the American Medical Association in Oster v. Bowen. Dr. Oster's experiences and his

counsel's advice were invaluable to the American Medical Association's efforts to intervene.

4. After the AMA moved to intervene in Oster v. Bowen but before the intervention request was ruled upon, the Federal Government expressed an interest in discussing the due process issues in the peer review organization process. I am convinced that this interest in meaningful discussions was prompted by the excellent facts present in Oster v. Bowen and the Federal Government's concern with a precedent, binding both itself and the American Medical Association rather than an individual physician such as Dr. Oster. It was apparent from the start of the discussions that the Federal Government desired to avoid a lawsuit with the American Medical Association which could have resulted in a nationwide injunction

against implementation of the PRO program by the Department of Health and Human Services.

5. At the initial meeting with the principal representatives of the Federal Government were Dr. William Roper, the Administrator of the Health Care Financing Administration, and Mr. James Patton, the Director of the Health Care Administrative Sanctions Staff of the Office of the Inspector General. Dr. Oster's counsel Mrs. Krebs-Markrich was also present with me and trial counsel for the American Medical Association. Mrs. Krebs-Markrich's participation in that initial meeting proved to be crucial because she had the in-depth knowledge of and practical experience with the peer review organization sanction process. She was able to articulate and graphically illustrate the deficiencies and

inadequacies of the sanction process. The federal representatives could not contradict her. Through Mrs. Krebs-Markrich's efforts the meeting resulted in specific and concrete issues being discussed. In my opinion, Mrs. Krebs-Markrich's efforts were a principal reason for the representatives of the Federal Government finally listening seriously to and considering the problems engendered by the constitutionally inadequate sanction proceedings developed by the Federal Government.

6. On April 6, 1987, the Court denied permission to the American Medical Association to intervene in Oster v. Bowen. The American Medical Association then filed virtually the identical lawsuit in the United States District Court for the District of Columbia a few days later.

7. On April 7, 1987, Mr. Ben W. Heineman, Jr., the American Medical Association's lead trial counsel, and I met with the representatives of the Federal Government. Present also were both of Dr. Oster's counsel, Mrs. Krebs-Markrich and Mr. Adams. Again, their in-depth knowledge and their actual examples of the inadequacy of the sanction procedures allowed both Mrs. Krebs-Markrich and Mr. Adams to deal persuasively with the federal representatives. In my opinion, the American Medical Association's ability to achieve changes in the federal sanction proceedings was enhanced, in a significant was, by Dr. Oster's counsel's help. Dr. Oster's lawsuit was an important catalyst that led ultimately to the new procedures issued in May 1987 in Transmittal No. 15 to the Peer Review Organization Manual

which, by contract, each peer review organization must follow. While Dr. Oster's counsel did not participate in the further meetings with the representatives of the Federal Government, the AMA remained in close touch with them, and they reviewed and commented upon the proposals made by the Federal Government.

Pursuant to 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Kirk B. Johnson

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Niels Oster, M.D.	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Otis R. Bowen, M.D., Secretary, United States Department of Health and Human Services;	)	Civil Action No. 86-0344-R
	)	
Richard P. Kusserow, Inspector General, United States Department of Health and Human Services; and	)	
	)	
Medical Society of Virginia Review Organization,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. My name is Julia Krebs-Markrich. I am an associate in the firm of McGuire, Woods, Battle & Boothe. I have practiced law exclusively in the health care field,

first with the Office of the Attorney General for five years, representing the State Board of Medicine, the State Board of Nursing, and the Department of Medical Assistance Services, and then with McGuire, Woods, Battle & Boothe since 1985.

2. Between 1985, when I joined my firm, and June, 1987, I normally charged $105 per hour for work defending physicians before the Medical Society of Virginia Review Organization and in any related litigation work. This rate is the same rate I charged in representing licensed professionals who have encountered problems with other regulatory bodies. Since June, 1987, I have charged $115 per hour.

3. There is a limited number of attorneys who specialize in health care in Virginia. I know of two other attorneys

in Virginia who handle cases before peer review organizations established pursuant to 42 U.S.C. Section 1320c through 42 U.S.C. Section 1320c-12. To the best of my knowledge, the number of attorneys available nationally who have experience representing physicians before such peer review organizations is limited.

4. The Oster case was a difficult and novel case because it was one of the first cases in the country to challenge medicare sanction procedures under 42 U.S.C. Section 1320c-5.

5. Robert Adams and I conducted a seminar on the medicare peer review organization sanction procedures in New Orleans in May of 1987 under the auspices of the National Health Lawyers Association, which is a national organization of attorneys who have health care clients. Since May, 1987, I have

been asked to address two other meetings of the National Health Lawyers Association to discuss the defense of physicians before peer review organizations. I also was asked to and did address the July, 1987 Medical Directors meeting of the American Medical Peer Review Association. Both Mr. Adams and I have been solicited by publishers of legal periodicals to write articles about the defense of physicians before peer review organizations.

6. Robert Adams and I have spent 765.2 hours representing Dr. Niels Oster since we began to prepare his case for trial. Attached to Mr. Adams' affidavit are detailed lists, which I have reviewed, of all billable hours, jobs performed, expenses, and the reasons for the expenses. To the best I can determine, this list does not include time spent

preparing for and attending the September 10, 1986, hearing before the Quality Assurance Committee of the Medical Society of Virginia Review Organization involving Dr. Oster.

Pursuant to 28 USC Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ Julia Krebs-Markrich

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Niels Oster, M.D.	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Otis R. Bowen, M.D., Secretary, United States Department of Health and Human Services;	)	Civil Action No. 86-0344-R
	)	
Richard P. Kusserow, Inspector General, United States Department of Health and Human Services; and	)	
	)	
Medical Society of Virginia Review Organization,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. I am, Martin A. Donlan, a partner in the law firm of Crews & Hancock.

2. I have practiced law in Richmond

for 11 years. I specialize in the health care field.

3. I am generally acquainted with the facts in the Oster v. Bowen case. I have charged $120 per hour for the same or similar work.

4. Through my experience in the health care field, I have found that cases involving medicare quality control peer review organizations are complex and are rarely seen by a general practitioner. In my opinion, a general practitioner would not have the necessary expertise to defend a case before medicare quality control peer review organizations. There are few attorneys in Virginia who specialize in health care, and there are even fewer who would have been able to handle a case such as Oster v. Bowen. Judging from the excellent results in this case and the promulgation of new federal procedures, it

is evident that Mrs. Krebs-Markrich and Mr. Adams handled this case with considerable skill and expertise.

5. From my experience with the same or similar cases, I have found that this type of case is extremely time consuming, thereby limiting the attorney's ability to take on other cases.

6. I have known Julia Krebs-Markrich and Robert Adams for ten years and eleven years, respectively, and I am aware of their excellent professional reputations, not only in the Richmond area but also throughout the state. I have, from time to time, opposed them in litigation as well as worked with them when my clients and theirs have had common interests.

7. I have reviewed all of the pleadings in the Oster case and substantial portions of the discovery depositions. I have also reviewed the

detailed billing statements setting forth the nature of the work done and time spent to do the work.

8. In my opinion, it is quite reasonable for Mr. Adams and Mrs. Krebs-Markrich to have spent 765.2 hours in Oster v. Bowen.

9. It is not unusual, given their expertise and reputation, for Mrs. Krebs-Markrich and Mr. Adams to charge $105 and $120 an hour, respectively. Those rates are to be expected from other health law specialists. In my experience the normal rate for attorneys in the health care field in Virginia with the same or similar experience and expertise ranges from $105 to $160.

/s/ Martin A. Donlan, Jr.

Signed and sworn to before me this 6th day of August, 1987, in my jurisdiction.

/s/ Karen E. Robertson
Notary Public

My commission expires: December 18, 1991

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	86-0344-R
OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services;	)	
	)	
RICHARD P. KUSSEROW, Department of Health and Human Services;	)	
	)	
and	)	
	)	
MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. My name is Robert T. Adams, I am a partner in the firm of McGuire, Woods, Battle & Boothe. I have practiced exclusively health care law since 1976

when I joined the Attorney General's Office of the Commonwealth of Virginia. In my tenure with the Attorney General's Office between 1976 and 1984, I represented exclusively the State Health Department, the Statewide Health Coordinating Council, the Virginia Health Services Cost Review Commission, and, on an as-needed basis, the Department of Mental Health and Mental Retardation. During this period of time I became conversant with the medicaid program in Virginia and as a consequence of that I also became familiar with the medicare program which oftentimes provided governing principles for a state's medicaid program. In August, 1984, I left the Attorney General's Office and joined McGuire, Woods, Battle & Boothe.

2. In cases involving physicians before the Medical Society of Virginia

Review Organization (MSVRO) and any related litigation, I normally charged $120 an hour between August, 1984 and June, 1987. Since June, 1987, I have charged $140 per hour. Based upon my experience in Virginia, there is a limited number of Virginia attorneys who regularly and exclusively specialize in the area of health law. As of this time, I am aware of only two other attorneys from other law firms who have represented physicians on any type of regular basis before the peer review organizations. Based upon my review of the depositions in Oster v. Bowen, I believe that Mrs. Julia Krebs-Markrich, my colleague, and I have represented the majority of doctors who have appeared before the Quality Assurance Committee of the M.S.V.R.O. with counsel.

3. The Oster case proved to be a complex and novel one because it was one

of the first cases in the United States to involve a challenge of the federal peer review organization sanction procedures. As a result of our knowledge in this area, Mrs. Krebs-Markrich and I were asked to give two seminars on medicare peer review organization sanction procedures for the National Health Lawyers Association at its annual health law update in New Orleans in May, 1987. I had previously spoken twice on other health law topics to earlier conferences conducted by the National Health Lawyers Association.

4. Based upon my review of my firm's records, Mrs. Krebs-Markrich and I have spent 765.2 hours preparing for the trial of Oster v. Bowen. This amount of time does not include the amount of time attributable to the preparation of Dr. Oster's defense before the Quality Assurance Committee of the Medical Society

of Virginia Review Organization. Attached hereto is a detailed list of our billable hours, the jobs performed, the expenses and the reasons for the expenses. Based upon my review, I believe that Dr. Oster has incurred attorneys fees and costs of $138,996.58.

Pursuant to 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Robert T. Adams

APPENDIX L

Letter from
McGuire, Woods, Battle & Boothe
Law Offices

October 23, 1987

Niels Oster, M.D.
P. O. Box 835
Tappahannock, Virginia 22560

Dear Dr. Oster:

I want to apprise you of the court's reaction to our argument on your motion for attorneys fees and also to discuss your bill.

The argument before Judge Merhige went well, in my opinion. We had anticipated that the judge would be somewhat antagonistic to the motion because were asking for nearly $140,000 worth of attorneys fees. Fortunately, and unexpectedly, the judge did not even mention the amount of fees. His reception to our motion was, overall, friendly. He indicated that we had worked very hard,

that we had gotten the Federal Government's attention, and that we had gotten his attention. He also stated that the process that was afforded you in June, 1986 had not even the least degree of fairness in it, and he disagreed with the U.S. Attorney who argued that it was only your desire for an award of attorneys fees that led to this lengthy litigation.

While you should certainly not depend upon these favorable statements as any indication that the court will award attorneys fees, you may take some comfort in the fact that the court appears to be sympathetic to your situation. Both the MSVRO and the Federal Government responded to our motion, raising a number of very significant and difficult legal defenses, such as the court's jurisdiction to award fees. Although we have responded, we believe, satisfactorily to each of those

issues, they are, nonetheless, significant defenses which, if accepted by the court, would preclude an award of attorneys fees. The judge indicated that he would take the matter under advisement and that he would announce his ruling at some later point in time. Neither Julia nor I have any way of predicting when that might be, but we are optimistic that the court will do so before the end of the year.

As I believe we have told you, we were not able to ask for an award of fees and costs relative to our preparation for an appearance at the September 10, 1986, QAC hearing. Accordingly, that sum of money will have to be paid by you in any event. According to our records, as of October 15, 1987, you have a total outstanding bill of $184,264.13. Taking into account that we have asked for an award of fees and costs in the amount of

almost $140,000, you will owe my firm approximately $46,000, despite any award that the court may make.

I would very much appreciate it if we could arrange a meeting between you and/or your business manager so that we can finalize arrangements for the payment of your defense before the QAC and also to discuss how we might arrange the payment for the other part of your bill, assuming that the court does not award fees or does not award fees in the amount that we have requested. To be perfectly candid, the amount of your bill is significant and my firm must make some type of arrangement with you that would satisfy your bill. I ask that you or your business manager contact my firm's General Manager Mr. John Iezzi to arrange an appointment to discuss this matter. Mr. Iezzi's telephone number is 775-1063.

If you have any questions concerning the argument and the motion for an award of attorneys fees and costs or about your bill, please do not hesitate to call me or Julia.

With kindest regards, I remain

Sincerely yours,

/s/ Robert T. Adams

RTA:ker

pc: John Iezzi
Julia Krebs-Markrich

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NIELS OSTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	86-0344-R
OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services;	)	
	)	
RICHARD P. KUSSEROW, Department of Health and Human Services;	)	
	)	
and	)	
	)	
MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION,	)	
	)	
Defendants.	)	

AFFIDAVIT

1. I am Benjamin W. Heineman, Jr., a partner in the law firm of Sidley & Austin. I make this affidavit in support of Dr. Niels Oster's motion for an award

of attorneys fees and costs. I have personal knowledge of the matters contained in this affidavit.

2. The American Medical Association is a regular client of my firm. In early 1987, Mr. Kirk Johnson, the General Counsel of the American Medical Association, contacted me to advise me of pending litigation in the Eastern District of Virginia under the caption of Oster v. Bowen, Civil Action No. 86-0344-R. Mr. Johnson asked me to contact Mr. Robert Adams, the plaintiff's counsel in Oster v. Bowen, in order to determine whether the American Medical Association should intervene in that lawsuit. I did so and, following my conversations with Mr. Adams, the American Medical Association decided to file a motion for leave to intervene in Oster v. Bowen. I was lead counsel in that case. Prior to filing in Oster v.

Bowen, my staff and I met with Mr. Adams and his colleague, Mrs. Julia Krebs-Markrich, to discuss the case and seek their advice as to appropriate causes of actions and allegations. Both Mr. Adams and Mrs. Krebs-Markrich provided us with copies of relevant pleadings and documentation pertaining to the peer review organization sanction process that was imposed by the Federal Government. The pleadings that had been filed in Oster v. Bowen by Dr. Oster and the advice obtained from Mr. Adams and Mrs. Krebs-Markrich was an integral part in the development of the American Medical Association's decision to seek to intervene.

3. After the American Medical Association filed in Oster v. Bowen, the Federal Government's representatives requested a meeting with the AMA to

discuss a possible way of improving and correcting the peer review organization sanction procedures. On March 25, 1987, Mr. Johnson, along with Mrs. Krebs-Markrich and other members of my firm, met with the principal representatives of the Federal Government including Dr. William Roper, the Administrator of the Health Care Finance Administration, and Mr. James Patton, the Director of the Health Care Administrative Sanctions Staff in the Office of the Inspector General. According to my partner, Carter G. Phillips, who was present, Mrs. Krebs-Markrich's attendance at that meeting proved to be very important. Through her detailed knowledge of the peer review organization sanction procedures and her practical experiences in Dr. Oster's case, she was able to describe for the federal representatives

actual examples and problems engendered by the constitutionally inadequate sanction procedures imposed by the Federal Government. Mr. Phillips emphasized in his account to me (I was out of town at the time) that her role in this meeting contributed significantly to the Federal Government's willingness to make a meaningful attempt to consider and to change its procedures.

4. On April 6, 1987 the United States District Court denied permission to the American Medical Association to intervene in Oster v. Bowen. As a consequence of that denial, the American Medical Association several days later filed a virtually identical lawsuit in the United States District Court for the District of Columbia. American Medical Association v. Bowen, No. 87-0995. Again, Dr. Oster's legal papers were very helpful

in the development of the American Medical Association's pleadings.

5. On April 7, 1987 Mr. Johnson and I met with the representatives of the Federal Government to discuss a specific set of changes in the PRO process. In attendance, also, were Mrs. Krebs-Markrich and Mr. Adams. Mrs. Krebs-Markrich's and Mr. Adams' participation proved invaluable to the discussion that ensued. They were able to respond to certain specific concerns expressed by the Federal Government, and, in my opinion, they were extremely persuasive in helping us convince the Federal Government that significant changes were needed immediately in the peer review organization sanction procedures. Indeed, Dr. Oster's lawsuit contributed significantly to the changes in the federal procedures because the American

Medical Association viewed it as an ideal vehicle for challenging the procedures nationwide and became involved in PRO litigation, in part, as a result of the suit. Dr. Oster's lawsuit clearly presented most of the due process issues which were the basis for the discussions with the federal representatives and which were addressed in the changes implemented by the Federal Government.

6. At the April 7, 1987 meeting with the federal representatives it was made very clear to us by Mr. Coleman, from the General Counsel's office of the Health Care Financing Administration, that the Federal Government expected the American Medical Association to withdraw its lawsuit in the District of Columbia if appropriate changes were to be made by the Federal Government. At that time, Mrs. Krebs-Markrich and Mr. Adams asked Mr.

Coleman in my presence whether the Federal Government would also be willing to settle Oster v. Bowen on the identical terms. Mr. Coleman indicated that he doubted seriously whether the Federal Government would be prepared to settle Oster v. Bowen and, in fact, Mr. Coleman stated that since the case involved "just" Oster, no settlement was likely.

7. I met with representatives of the Federal Government on several occasions after April 7, 1987 to develop the text of the changes to the peer review organization manual. I also spoke by phone on numerous occasions with federal officials to iron out an agreement on changes. During that time, I was in frequent contact with both Mrs. Krebs-Markrich and Mr. Adams to seek their advice on particular issues as they arose.

Pursuant to 28 U.S.C. Section 1746, I

declare under the penalty of perjury that the foregoing is true and correct.

/s/ Benjamin W. Heineman, Jr.

APPENDIX N

Appeared in the August 13, 1986 edition of the Richmond News Leader, Richmond, VA

DOCTOR'S MEDICARE CASES PROMPT REVIEW
By Elizabeth Moberg,
News Leader staff writer

A Tappahannock physician is being questioned by the state's Medicare review panel about the treatment he provided to seven Medicare patients, five of whom died.

The Medical Society of Virginia Review Organization is looking into allegations that Dr. Niels Oster, 59, committed six "gross and flagrant" violations and one "substantial" violation when treating Medicare patients ranging in age from 73 to 100, according to records filed in U.S. District Court here.

Dr. Oster is acting director of Tidewater Memorial Hospital's emergency room in Tappahannock and is medical

director of two nursing homes -- Warsaw Health Care Center in Warsaw and Tappahannock Manor in Tappahannock. According to records in U.S. District Court, 65 percent of Dr. Oster's practice involves Medicare patients.

Neither Dr. Oster nor his lawyer, Julia Krebs-Markrich, would comment on the allegations.

According to review organization definitions, a "gross and flagrant violation" places a patient in a high-risk situation in which there may be loss of a limb, body organ, body function or death, said Dr. Eugene F. Poutasse, chairman of the state quality assurance committee of the review organization.

A "substantial violation" places a patient in a lower-risk situation.

According to documents submitted to U.S. District Court here, a 12-physician

regional review committee reported in May that, between January 1985 and February 1986, Dr. Oster failed to diagnose or provide proper care to seven patients suffering from problems that included heart attacks, strokes, hemorrhages and congestive heart failure.

In four cases, no treatment was given for problems that had been diagnosed and, in the remaining three cases, treatment was termed minimal or inadequate, according to the documents. Five of the patients died within three days of admission.

According to the review organization's report to the court, the patients included:

1) A 76-year-old woman admitted to a hospital Jan. 31, 1985. She was diagnosed with "unstable angina." She received no treatment for this problem, and was

discharged Feb. 9 with the same diagnosis.

2) A 100-year-old comatose woman who was admitted Aug. 15, 1985, after falling at home. She received "no treatment" for dehydration and urea in her blood. She died one day after admission.

3) An 83-year-old patient admitted Oct. 2, 1985. Her treatment for congestive heart failure was termed "inadequate." She died two days after admission with a diagnosis of acute respiratory failure.

4) A 75-year-old woman who was admitted twice. The first time, Oct. 12, 1985, a test showed brain abnormalities, but these were "not addressed," reviewing physicians said. The woman was released Oct. 17, readmitted 13 days later and died of a stroke.

5) A 73-year-old man admitted Oct. 13, 1985, with chest pains. Tests

indicated he was having an acute heart attack but he received "no critical care management," reviewing physicians said.

6) A 96-year-old woman who was admitted June 12, 1985, in shock from a massive gastrointestinal hemorrhage. Reviewing physicians criticized the treatment because she was given no blood or plasma expanders. She died from shock three days after admission.

7) An 82-year-old woman admitted Feb. 17, 1986, with a diagnosis of "acute gastroenteritis," when reviewing physicians said tests indicated she almost certainly had suffered a heart attack that was not recognized or treated. She suffered a second heart attack the next morning and died that day.

Names of the patients and hospitals were not revealed in the document.

Dr. Poutasse said Dr. Oster has more

alleged violations than any other physician investigated by the organization, which for two years has watched over practice patterns of all doctors who participate in Medicare in Virginia.

Details concerning the investigation of Dr. Oster became public record because he asked the U.S. District Court to give his lawyer freedom to speak during a preliminary review meeting. The review organization agreed to the lawyer's presence, with some limitations on her statements.

If Dr. Oster had not gone to court, details of the investigation would have been secret and review society officials would not have commented on it at this stage, Dr. Poutasse said.

Ms. Krebs-Markrich said in U.S. District Court here that Dr. Oster has

practiced medicine in Virginia for 20 years and has never been involved in a malpractice lawsuit or had a complaint lodged against him by the State Board of Medicine.

The investigation of Dr. Oster's medical charts by the review organization began in June 1985, when one chart was kicked out by a computer for some abnormality during a routine screening process, said Dr. Poutasse.

After the committee looked at that chart, it decided to review 40 additional cases. Six of those were selected for further scrutiny.

Three regional review committee meetings then were arranged, said Freeman Vaughn, executive director of the state's review organization. Dr. Oster did not attend those meetings and cited illness, a snowstorm and a scheduling conflict as

reasons, Dr. Poutasse said.

The committee finally questioned Dr. Oster by telephone in February, and when "his answers did not satisfy the review committee," the June meeting was scheduled, he added.

The day before the meeting, however, Dr. Oster took the committee to court.

Vaughn said committee officials cannot comment on the merits of the case because no judgments have been made. Those judgments ultimately will be made by federal officials and will be based in part on the recommendations of the state review committee.

If Dr. Oster is determined to have caused serious injury or death of a patient, potential penalties administered by the federal government include denial of the right to treat future Medicare patients, monetary fines or close

supervision of his practice for a specified amount of time.

Currently, Medicare cannot deny doctors or hospitals payment for substandard care. Under a federal regulation that will go into effect Jan. 1, however, Medicare will have the option of denying payment.

While cases are under review, the review organization also cannot inform the State Board of Medicine, which licenses physicians, about the matter unless the physician "poses an imminent danger to community health," Dr. Poutasse said.

In Dr. Oster's case, the board was informed because the case became public in court, Dr. Poutasse said.

A Department of Health Regulatory Boards spokesman said she could not confirm or deny that the Board of Medicine was conducting an investigation of the

case.

APPENDIX O

TRANSCRIBED
From June 4, 1987
Hearing, p. 31

Consider the harm to be done, the risk of erroneous deprivation, administrative burden. I don't think it is much of an administrative burden. This is not a situation in which this man is in effect precluded from treating patients. If that were it, I would be a little bit more concerned, because I have got to give consideration to the public.

But certainly the public is interested in hearings which sound, and I know, I just hope and pray this is wrong, almost like a Kangaroo Court. If they like you, you can have witnesses. If they don't like you, you can't have witnesses. I don't know what the standard is.

I hope it isn't that. I don't really think it is that, because these are

intelligent people.

But in any event, I am going to enjoin them from having their hearing until we have had a fuller hearing. And the injunction will last for ten days. Do you have a sketch of one?

Mrs. Krebs-Markrich: Yes, your Honor.

The Court: Pass it up.

Unless sooner modified. 5 hundred dollar bond.

I have added to this, this is injunction shall take effect upon the plaintiff placing 5 hundred dollar bond with the Clerk. And shall remain in effect for a period of ten days unless sooner modified, vacated or enlarged.

Thank you. Recess the court.

APPENDIX P

TRANSCRIBED
From June 4, 1987
Hearing

Suits every time one of these things come up. And the burden of proof ought to be on the people who are charging the Doctor with malreasance, and is there any question that from counsel?

Mrs. Jones: Yes, Sir, there is. There is a question.

The Court: You don't agree?

Mrs. Jones: The proceeding has as yet is not set up as an adversary proceeding with a prosecutor.

The Court: I am talking about who has to show that the Doctor has done wrong. Does he have to prove he didn't, or do you show he did?

Mrs. Jones: He has to satisfy the M.S.V.R.O. that the issues of concern have been met and have been explained.

The Court: Well, you are going to lose. Go ahead.

Mrs. Krebs-Markrich: Judge --

The Court: That is a violation of due process if I ever heard it. Violation of decent fairness, if I ever heard it.

Mrs. Krebs-Markrich: The other thing that we have asked for, your Honor, apart from knowing the burden and having them carry the burden is articulation of the standard of care. We have been told that the standard is not the Virginia standard that is in Title 801. We have been told . . .

APPENDIX Q

Letter from
McGuire, Woods, Battle & Boothe
Law Offices

May 5, 1987

By Hand Delivery

Jessica S. Jones, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23219

Re: Oster v. Bowen, et al.

Dear Jessica:

Late last week I received some fairly disturbing news and I would like you to look into it. I would have written you this letter earlier, but, unfortunately, I was called out of town unexpectedly.

David Austin, who we have identified as one of our witnesses, called me last week to relate an incident that evidently concerns one of your law clerks. According to Dave, Tom Dillon called to the Department of Medical Assistance Services and talked to two people before

he finally reached David. In each of his conversations, Dillon related that he was preparing a paper for law school concerning the sanction process and asked for information. David indicates that he offered to send Dillon certain information, but Dillon indicated that he needed the information sooner and would attempt to pick it up. At no time during these conversations did Dillon indicate that he was employed by your firm or that he was working with you on the Oster case.

Subsequently, David had a conversation, I believe with you, and learned that Dillon was employed by your firm and was helping you to prepare for the Oster case. This revelation was somewhat disturbing to David in view of Dillon's prior explanations as to why he wanted the information.

Both Julia and I are concerned about

this situation, if the facts are as we understand them to be. The MSVRO has not made any attempt to avail itself of the discovery process to ascertain what our potential witnesses might provide in the way of evidence, and now the discovery process has ended. We do not believe it is appropriate to approach potential witnesses, using a subterfuge like the one that was used in this case. We are very concerned about the intimidating effects that such contacts can have; clearly, witnesses should be told why they are being contacted. For that reason, we would appreciate your looking into this matter. Please let us know exactly what happened.

I trust that, if you find that the facts are substantially as I have related them to you, you will take appropriate action to ensure that such incidents do

not occur in the future.

Sincerely yours,

/s/ Bob
Robert T. Adams

RTA:kvv

cc: Niels Oster, M.D.
Mr. David Austin
Julia Krebs-Markrich, Esq.